

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

BRIAN MCVEIGH,  
Plaintiff and Appellant,  
v.  
RECOLOGY, INC. et al.,  
Defendants and Appellants.

A143788

(City and County of San Francisco  
Super. Ct. No. CGC10504569)

**BY THE COURT:**

It is ordered that the opinion filed on January 29, 2018, is modified as follows:

At page 12, delete: “The judgment is affirmed. Each party shall bear its own costs on appeal.” Replace the deleted text with the following: “McVeigh’s appeal from the order granting double rather than treble damages is dismissed as moot. In all other respects, the orders of the trial court are affirmed. Each party shall bear its own costs on appeal.”

The petition for rehearing is denied. There is no change in the judgment.

Dated: \_\_\_\_\_ P.J.

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Plaintiff Brian McVeigh sued Recology, Inc. and one of its subsidiaries (Recology) under the California False Claims Act, alleging numerous false claims presented to the state and the City and County of San Francisco (the City). Following a 3-week trial, the court granted a new trial on the one claim on which McVeigh prevailed and denied McVeigh's motion for partial judgment notwithstanding the verdict (JNOV) on 25 other claims. McVeigh contends both rulings were erroneous and that the court erred when it declined to award treble damages. Recology contends the court should have granted a JNOV, rather than new trial, on the verdict in favor of McVeigh. The rulings are supported by the law and the record, so we affirm.

**BACKGROUND**

Recology provides waste collection, recycling and disposal services to San Francisco residents and businesses. (See *McVeigh v. Recology San Francisco et al.* (Jan. 31, 2013, A131833)[nonpub. opn.] (*McVeigh I.*)<sup>1</sup> McVeigh, a former employee, sued

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<sup>1</sup> We have issued two prior opinions in McVeigh's separate but factually related employment action against Recology, in which McVeigh contended Recology fired him

Recology as a *qui tam* plaintiff under the California False Claims Act (CFCA, or the Act) for allegedly submitting 154 false claims to the state seeking reimbursement for California Redemption Value (CRV) payments and three false claims to the City seeking incentive payments for diverting waste from landfill. To the extent possible, we confine our discussion of the evidence to what is strictly necessary for resolution of the issues presented on appeal.

### **A. Diversion Incentive Account Claims**

McVeigh’s successful claim involved funds withdrawn from an account known as the Diversion Incentive Account, or DIA. The DIA was established as a financial incentive to encourage Recology to divert a higher percentage of recyclable and compostable waste away from landfills. San Francisco’s Refuse Collection and Disposal Initiative Ordinance establishes the City’s procedure for setting rates for collecting refuse from “residences, flats and apartment houses of not more than 600 rooms.”<sup>2</sup> (S.F. Admin. Code, Appendix 1, § 6(a).) But the DIA, established in 2001, allows Recology to earn a higher return if it sends less than a specified amount of refuse to landfills in a given year. This mechanism authorizes Recology to increase residential rates by a specified formula with the incremental revenue deposited into the DIA. If Recology meets annual goals for diverting solid waste from landfills it may withdraw that revenue and interest from the incentive account. If not, the funds in the DIA are rebated with interest to the ratepayers.<sup>3</sup>

At the end of the 2008 rate year, Recology notified the City it had diverted sufficient waste material from landfills to entitle it to withdraw \$1,363,441.24 plus interest from the DIA. The City approved the withdrawal. Recology’s withdrawal

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in retaliation for reporting possible fraud against the state. (*McVeigh I, supra*; *McVeigh v. Recology San Francisco et al.* (Nov. 27, 2017, A146058 [nonpub.opn.].)

<sup>2</sup> Commercial rates, i.e., rates for “establishments other than residences, flats and apartment houses of not more than 600 rooms” are “subject to contract between the producer and a duly licensed refuse collector.” (S.F. Admin. Code, Appendix 1, § 6(b).)

<sup>3</sup> In 2006 the City made changes to how the incentives and landfilled amounts were calculated, but those changes make no difference to our analysis.

reduced the amount of money that would be refunded to residential ratepayers from the DIA.

McVeigh's complaint alleged that Recology "engaged in the creation, presentation, and conspiracy to submit false claims to officers of the City and County of San Francisco to obtain approval to be paid Diversion Incentive payments" for rate years 2005, 2006, 2007 and 2008. McVeigh specified numerous methods by which Recology allegedly underreported the refuse it sent to landfills, "including Recology's false reporting of tons delivered to landfills from the IMRF<sup>[4]</sup> and composting programs as diverted from landfills, the use of false reports from third party waste processing companies, and by failing to report the tonnage of trash and contamination shipped to landfill that was reported as diverted from landfill in green waste and food waste shipments."

## **B. CRV Material Claims**

Recology operates a "buyback center" at its Tunnel Avenue facility where customers can redeem for cash eligible recyclables such as aluminum and glass containers. Redeemed "California Redemption Value" material is weighed at Tunnel Avenue<sup>5</sup> and transferred by truck to Recology's facility at Pier 96, where it is weighed upon arrival. The Pier 96 facility also receives CRV material from Recology's curbside collections, third-party buyback centers and collection programs, and a buyback center operated at Pier 96.

Recology reports the weight of each shipment of CRV materials from Tunnel Avenue on a state-mandated shipping report called a DR-6. The DR-6 is used to request payment from the state for the recyclables. However, the outgoing weight recorded at Tunnel Avenue often differed from the weights received at Pier 96. McVeigh attributed such discrepancies to theft and fraud.

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<sup>4</sup> The IMRF is a construction material recycling and sorting facility at Recology's Tunnel Avenue facility.

<sup>5</sup> The Tunnel Avenue buyback center is also referred to as the "Bayshore Buyback."

In 2008 and 2009 the state Department of Resources, Recycling and Recovery (CalRecycle) conducted an extensive investigation of McVeigh's allegations of fraud at the Tunnel Avenue buyback center. The investigation, which took 340 hours to complete, focused on whether Recology was overbilling the state for CRV material. To that end, CalRecycle analyzed Recology's DR-6 shipping reports to "validate whether [Recology's] claims are supported by customer purchase records." No fraud was detected.

### **C. Verdict and Post-Trial Rulings**

The jury found that Recology submitted one false claim to the City in 2008 for payment from the Diversion Incentive Account, assessed damages of \$1,366,938.45, and found for Recology on all of the remaining allegations. The court rejected McVeigh's requests for prejudgment interest and treble damages under Government Code section 12651,<sup>6</sup> awarded double damages, and allocated the proceeds of the lawsuit equally between McVeigh and the City.

Recology moved for JNOV or a new trial on McVeigh's 2008 DIA claim. McVeigh moved for partial JNOV or a new trial on 25 of his CRV claims and, if the court were to grant Recology's new trial motion, for a new trial on his other two DIA claims.

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<sup>6</sup> Government Code section 12651, subdivision (a) provides that a person found liable under the CFCA "shall be liable to the state or to the political subdivision for three times the amount of damages that the state or political subdivision sustains because of the act of that person." Section 12651, subdivision (b) permits the court to award double damages instead if it finds that "(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information. [¶] (2) The person fully cooperated with any investigation by the state or a political subdivision of the violation. [¶] (3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation."

Unless otherwise noted, statutory citations are to the Government Code.

The court granted Recology's new trial motion, denied both parties' motions for JNOV, and denied McVeigh's motion for a new trial. Both parties filed timely appeals.

## **DISCUSSION**

### **I. McVeigh's Appeal**

#### **A. The Court Properly Granted a New Trial on McVeigh's DIA Claim**

The CFCA imposes liability on any person who “[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval.” (Gov. Code, § 12651, subd. (a)(1).) The purpose of the CFCA is “to protect the public treasury and the taxpayer,” so a claim under the CFCA must involve funds “that are in some sense part of the public treasury.” (*State of California v. Altus Finance* (2005) 36 Cal.4th 1284, 1296, 1302.) Here, the trial court granted Recology's motion for new trial on the ground that the evidence failed to establish a payment of public funds. It explained: “the claim required proof that some City money was part of the Diversion Incentive Account from which the false claim was paid. No such evidence was presented at trial nor was there any evidence presented from which a reasonable inference that the account included City money could be drawn.” Our analysis of the record under the controlling standard of review confirms the ruling is correct.

Our review of an order granting a new trial is generally for abuse of discretion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859-860.) “The determination of a motion for new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter. So long as a reasonable or even fairly debatable justification under the law is shown for the order granting the new trial, the order will not be set aside.’ ” (*Jiminez v. Sears, Roebuck & Co.* (1971) 4 Cal.3d 379, 387 (*Jiminez*).) “ ‘ “This court makes all presumptions in favor of the order as against the verdict, and this court will reverse only if a manifest abuse of discretion is shown.” ’ ” (*Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1323.)

McVeigh disagrees. He asserts that, although the court granted a new trial, its order *in effect* granted JNOV because it was premised on his failure to prove an essential element. Accordingly, he maintains, we must review the ruling “as a matter of law, with all inferences of substantial evidence in favor of the verdict.” (See generally *Dell’Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 548-549 (*Dell’Oca*) [comparing nature of and standard of review for motions for new trial and JNOV].) He is mistaken.

To be clear, the court *denied* Recology’s motion for JNOV on McVeigh’s DIA claim when it simultaneously granted a new trial. Plainly, the court distinguished between the two motions. More to the point, the record shows that the grant of a new trial was simply that and nothing else. It is true, as McVeigh asserts, that courts of review will construe a new trial order as a grant of JNOV if the ruling “disposes of the litigation,” i.e., if “[i]n granting the motion the court essentially rules the plaintiff never can prevail, even if the matter were to be retried.” (*Dell’Oca, supra*, 159 Cal.App.4th at p. 548.) But this was not such a case. As *Dell’Oca* explains, the trial court may grant a new trial, not because it concludes “that the plaintiff *must* lose, but only because the evidence in the trial that actually took place did not justify the verdict. Evidence might exist to justify the verdict, but for some reason did not get admitted; perhaps [because] the plaintiff’s attorney neglected to call a crucial witness or ask the right questions. *There is still the real possibility that the plaintiff has a meritorious case.*” (*Ibid*, italics in original; cf. *Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 575 [trial court is not *required* to grant new trial rather than JNOV where evidence existed that could have been, but was not, presented at trial]; see 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, § 39 pp. 625-626.)

The record suggests this happened here. Recology moved for nonsuit after both sides rested. In opposition, McVeigh’s attorney told the court McVeigh possessed, but had chosen not to present, direct evidence that there was public money in the DIA: “[W]e were prepared with rebuttal evidence if they had put anything on this that said the City isn’t part of this that we were prepared to present evidence that the City has

numerous [*sic*] that it actually pays for as rates. . . .” He continued: “[Counsel]: The City pays that because it is required. [¶] THE COURT: Hold on a second. You were prepared. [¶] [Counsel]: Yes, if they presented evidence—[¶] THE COURT: You didn’t, and we’re talking your case in chief. So I don’t—I mean, we have a whole lot of what could have been explicated. [¶] [Counsel]: That’s exactly right. We have the evidence in with the inferences available. . . .”

In this situation, the trial court’s decision to grant a new trial “ ‘does not entail a victory for one side or the other. It simply means the reenactment of a *process* which may eventually yield a winner.’ ” (*Dell’Oca, supra*, 159 Cal.App.4th at p. 548.) Here, the new trial order enables McVeigh to press his 2008 DIA claim, presumably with the requisite evidence. McVeigh’s theory that the order must be reviewed under the JNOV standard is unavailing.

Resting on his view that there was no substantial evidence to support JNOV, McVeigh has not even attempted to show the court exceeded its broad discretion in granting a new trial, i.e., that no “reasonable or even fairly debatable justification under the law is shown for the order.” (*Jiminez, supra*, 4 Cal.3d at p. 387.) Nor can his arguments about a JNOV the court did not grant be repurposed as a valid challenge to the new trial order. A trial judge granting JNOV “ ‘ “cannot reweigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citation.]’ [¶] . . . [¶] If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.” ’ ” (*Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510.) On the other hand, “[t]he judge presented with a motion for new trial on the ground of insufficient evidence may review conflicting evidence, weigh its sufficiency, consider the credibility of witnesses, reject any testimony believed false, and draw any reasonable inferences from the evidence.” (8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, §38 p. 623.) McVeigh’s appellate challenge to the new trial order ignores these critical differences between the motions and the different standards of review that follow

from them. Accordingly, it is forfeited. (See, e.g., *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177-1178; *Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 685.) “ ‘It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness.’ ” (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 204.)

McVeigh’s argument that the court erred when it denied treble damages is moot in light of our affirmance of the new trial order. We will not address it.

### **B. The Court Properly Denied Partial JNOV on McVeigh’s CRV Claims**

McVeigh contends the trial court should have granted his motion for judgment notwithstanding the verdict on the CRV claims. In his view, the evidence compelled the conclusion that Recology falsely claimed state reimbursement by reporting on the DR-6 forms the weights of recyclables leaving its Tunnel Avenue buyback center, instead of weights received at Pier 96. By using the shipped rather than received weights, he maintains, “Recology was not accounting for any losses that occurred between the time the shipments were weighed going out of Tunnel Avenue and the inbound shipments coming into Pier 96. . . . This is a violation of State requirements for reimbursement.” The trial court disagreed.

Code of Civil Procedure section 629 provides: “The court . . . on motion of a party against whom a verdict has been rendered, shall render judgment in favor of the aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made.” (Code Civ. Proc., § 629, subd. (a).) “ ‘The trial court, in a proper case, may direct a verdict in favor of a party upon whom rests the burden of proof, in this case the plaintiff.

Substantially the same rules apply to directed verdicts in favor of plaintiffs as apply to such verdicts in favor of defendants. . . . A motion for a directed verdict may be granted upon the motion of the plaintiff, where, upon the whole evidence, the cause of action alleged in the complaint is supported, and no substantial support is given to the defense

alleged by the defendant.” (*Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal.App.3d 781, 787.) On review from the denial of a plaintiff’s motion for JNOV, “the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.” (*Id.* at p. 782.)

The record contains such evidence. To prove a violation of the CFCA, McVeigh was required to prove Recology acted with the requisite scienter. The Act is violated if a person “[k]nowingly presents or causes to be presented a false or fraudulent claim for payment or approval.” (§12651, subd.(a)(1) (*italics added*)). Under the CFCA, “knowingly” means that, with respect to the alleged false claim, a person “[h]as actual knowledge of the information,” “[a]cts in deliberate ignorance of the truth or falsity of the information,” or “[a]cts in reckless disregard of the truth or falsity of the information.” (§ 12650, subd. (b)(3) (A), (B), & (C).) “ ‘Mere negligence and “innocent mistake[s]” are not sufficient to establish liability under the FCA.’ ” (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 549) Nor are “differences in interpretations.” (*Gonzalez v. Planned Parenthood of Los Angeles* (9th Cir. 2014) 759 F.3d 1112, 1115; see *United States ex rel. Purcell v. MWI Corp.* (D.C. Cir. 2015) 807 F.3d 281, 287-288 [“[T]he FCA does not . . . reach those claims made based on reasonable but erroneous interpretations of a defendant’s legal obligations”]).<sup>7</sup>

Here, even if Recology erred when it used the Tunnel Avenue rather than Pier 96 weights to claim CRV reimbursement,<sup>8</sup> the jury could reasonably have found McVeigh failed to prove it acted knowingly, recklessly, or in deliberate ignorance of its responsibilities under the Act. As shown by extensive documentary evidence and testimony, the regulations and procedures that govern how recycling centers like Recology claim reimbursement for CRV materials are complex and in respects

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<sup>7</sup> The CFCA’s scienter requirements are the same as under its federal counterpart. (*Thompson Pacific Construction, Inc. v. City of Sunnyvale, supra*, 155 Cal.App.4th at p. 549.)

<sup>8</sup> To be clear, we express no opinion on that question.

ambiguous. The jury could have found that, even if Recology's practice of using the Tunnel Avenue weights on its DR-6 forms ran afoul of those regulations, its violations were neither reckless nor intentional. (See, e.g., *U.S. ex rel. Lamers v. City of Green Bay* (7th Cir. 1999) 168 F.3d 1013, 1018 ["errors based simply on faulty calculations or flawed reasoning are not false under the FCA"]; *Hagood v. Sonoma County Water Agency* (9th Cir. 1996) 81 F.3d 1465, 1477 [evidence of a disputed legal issue was "not enough to support a reasonable inference that the allocation was *false* within the meaning of the False Claims Act"].)

Alternatively, the jury could have found that the regulations in fact required Recology to base its DR-6 reports on the weights recorded in transactions with customers at Tunnel Avenue, or, at a minimum, that Recology reasonably believed this to be so. For example, the state's "Participant Manual for Certified Processors and Certified Recycling Centers" instructed Recology as a "consolidated report[er]" to "[e]nter the weight of materials received as indicated on the weight ticket for the load, *or from the total weight purchased for transactions with consumers* within the receipt and log dates." (Italics added.) Defense CPA Herman Brause testified that "if [Recology] follow[ed] the state requirements, [the weight reported on the DR-6] *would be based on the buyback center actual weights that they purchased*. The methodology that the company used was then to adjust that for any deviations from what was purchased to what was actually possessed." (Italics added.)

Brause testified in detail about Recology's process of "writing off" inventory to adjust for discrepancies between weights recorded at the buyback center and received at Pier 96. He explained: "you would run into situations where what actually has been shipped would exceed what [Recology employee Cam Lam-Choi] had available in her book inventory. And in those cases—or what the actual inventory was was less than . . . what was in the book inventory. And in those cases, she would write down that available inventory . . . . So it's actually an adjustment of the amount she could have available to use on the DR-6s." This protected the state from overpaying: "[the written-off material]'s never been claimed on the DR-6 form, so the state's never going to reimburse

that amount.” ” Brause testified that once he had a full understanding of Recology’s write-off methodology “and how they go about creating a DR-6, I know they are [ad]justing for any inconsistencies that could have occurred” between the weights shipped from Tunnel Avenue and the weights received at Pier 96. He concluded that Recology “was, in fact, not overstating the DR-6 and were going through a thought-out methodology for adjusting any issues that could occur from, really, point A of when they originally purchased any commodity or any material to that point that it went to a third party.”

The jury also heard evidence about a 2009 state investigation that found Recology violated state regulations by preparing shipping reports from Pier 96’s received weights *instead of* the Tunnel Avenue buyback center’s weight records. It heard Brause’s conclusion that the DR-6 forms did not overstate the weight of recyclables Recology claimed for reimbursement. And it heard the testimony of the Recology employee who prepared the DR-6 forms that she used the weights from the Tunnel center “because that is the scale the state approved for” and she had “never heard” that she should instead report the weight of CRV material received at Pier 96.

The jury’s rejection of the CRV claims is supported by substantial evidence, so the court correctly denied McVeigh’s motion for JNOV.

## **II. Recology’s Appeal**

Recology argues the court should have granted JNOV instead of a new trial on McVeigh’s DIA claim because McVeigh presented no evidence there was any City money in the DIA account. In support, Recology goes to considerable length to rebut McVeigh’s various arguments that his evidence at least supports an inference that City revenues ended up in the account from which the DIA claims were paid. No matter. As we observed in Section I, the trial court could and, we presume, did grant a new trial rather than JNOV on McVeigh’s representation that he possessed, but had refrained from presenting, evidence of payments made from City funds. That was a valid basis for a new trial (*Dell’Oca, supra*, 159 Cal.App.4th at p. 548), so we will not disturb the court’s ruling. “ ‘A judgment or order of the lower court is presumed correct. All intendments

and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Recology proposes a second reason the court should have granted JNOV. It maintains there was no substantial evidence that its claim for funds from the DIA was materially false. Specifically, and again at considerable length, it argues the evidence failed to support McVeigh’s claim that Recology inflated the amount of waste it diverted from landfills by doing any or all of the following: (1) improperly treating “compost overs” (oversized organic materials that are separated from compostable waste and used as “alternative daily cover,” or ADC, to cover landfills) as diverted waste; (2) counting “iMRF fines,” or small particles of construction and demolition waste, as ADC rather than landfill; (3) overstating the tonnage of wet concrete diverted from landfill and “re-used” to improve the Tunnel Avenue site; (4) misreporting the waste received from other counties and sent to landfill; (5) including non-organic contaminants in green waste; and (6) sending green waste to landfill without reporting it as landfill.

We have carefully reviewed these arguments and the supporting evidence. That evidence, and Recology’s argument about what it did or did not show, establishes just one thing with any clarity. Whether or not Recology improperly manipulated the numbers supporting its claim to DIA funds was the subject of voluminous, complex, conflicting and vigorously disputed testimony and documentary evidence on both sides. Accordingly, Recology was not entitled to a JNOV. (See *Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1138 [JNOV may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support].)

### **DISPOSITION**

The judgment is affirmed. Each party shall bear its own costs on appeal.

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Siggins, P.J.

We concur:

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Jenkins, J.

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Fujisaki, J.

*McVeigh v. Recology*, A143788